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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 MIGUEL A. CRUZ, and JOHN D. HANSEN,
individually and on behalf of all others
17 similarly situated,

18 Plaintiffs,

19 v.

DOLLAR TREE STORES, INC.,

20 Defendant.

CASE NO. C 07 2050 SC

21 ROBERT RUNNINGS individually, and on
behalf of all others similarly situated,

22 Plaintiff,

23 v.

24 DOLLAR TREE STORES, INC.,

25 Defendant.

CASE NO. C 07 04012 SC

**DEFENDANT DOLLAR TREE
STORES, INC.'S NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT AS TO
ROBERT RUNNINGS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

JUDGE: Hon. Samuel Conti
COMPLAINTS FILED: April 11, 2007
July 6, 2007
TRIAL DATES: No dates set.

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1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that as soon as counsel may be heard in
3 Courtroom 1 of the above-entitled Court, located at 450 Golden Gate Ave., 17th Floor,
4 San Francisco, CA, Defendant, Dollar Tree Stores, Inc. ("Dollar Tree") will, and hereby
5 does, request that the Court summarily adjudicate in Dollar Tree's favor as to Plaintiff,
6 Robert Runnings ("Runnings"), each and every count of the Complaint. Specifically, this
7 Court should find that Runnings is properly classified as an exempt employee under the
8 California Labor Code, since he spends or should spend the majority of his time
9 performing managerial exempt duties in order to carry out the primary purpose of his
10 position which is the management of his Dollar Tree store.

11 Runnings' First Cause of Action seeks relief for unfair competition and
12 unfair business practices. This claim is derived from Runnings' erroneous assertion that
13 he is a non-exempt employee and can survive only if Runnings were able to prove that
14 Dollar Tree had violated the California Labor Code or Wage Order as alleged in the
15 Complaint. However, all those alleged violations are premised on the assumption that
16 Runnings was a non-exempt employee. Since Runnings is properly classified as an
17 exempt employee, he cannot establish any such violations and therefore has no basis
18 on which to pursue this claim. Accordingly, the First Cause of Action should be
19 adjudicated in Dollar Tree's favor.

20 In his Second Cause of Action, Runnings alleges he was improperly denied
21 overtime compensation; improperly denied compensation for missed meal and rest
22 periods; and is entitled to waiting time penalties. Since Runnings is an exempt
23 employee, he is not entitled to overtime compensation or meal and rest breaks. Waiting
24 time penalties are available only to those who failed to receive all wages due them upon
25 termination of employment and since Runnings still works for Dollar Tree and has had no
26 breaks in service for Dollar Tree, as a matter of law, waiting penalties are not available to
27 him. Therefore, the Second Cause of Action should be adjudicated in favor of Dollar
28 Tree.

1 The Third Cause of Action, Dollar Tree's alleged failure to provide meal
2 and rest breaks, is premised exclusively upon Runnings' allegations that he is a non-
3 exempt employee. Since Runnings is an exempt employee, this Cause of Action should
4 be adjudicated in Dollar Tree's favor.

5 The Fourth Cause of Action alleges that Dollar Tree improperly failed to
6 provide Runnings with accurate wage statements. Since Runnings is an exempt
7 employee, the law does not require that Dollar Tree provide him with an itemized wage
8 statement. Accordingly, Runnings' claims under the Fourth Cause of Action should be
9 denied.

10 This motion is based upon this Notice of Motion and Motion for Summary
11 Judgment, the Memorandum Of Points and Authorities in support thereof, the Request
12 for Judicial Notice, the Declarations of Carlos Hernandez, Paula Brady, Charlotta
13 Jacobson-Allen and Beth Hirsch Berman as well as all records and proceedings in this
14 action, and on such other and further matters as may be presented to the Court in
15 connection with the hearing on this Motion for Summary Judgment. This motion is being
16 filed and served pursuant to Fed. R. Civ. P. 56.

17 DATED: January 19, 2008

Respectfully submitted,

KAUFF MCCLAIN & MCGUIRE LLP

19 By: /S/
20 ALEX HERNAEZ

21 Attorneys for Defendant
22 DOLLAR TREE STORES, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELIEF REQUESTED.

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, Defendant Dollar Tree Stores, Inc. ("Dollar Tree") respectfully requests that the Court enter an Order granting summary judgment in Defendant's favor regarding Plaintiff Robert Runnings' ("Runnings") claims for relief which arise under the California Labor Code, and California Business and Professions Code.

II. INTRODUCTION.

Dollar Tree owns and operates retail variety discount stores nationwide, selling a broad assortment of goods, including but not limited to, housewares and household cleaners; foods and beverages; party and seasonal goods; toys; hardware; pet supplies; stationery; automotive products; and health and beauty aids, all at the \$1.00 price point.

Runnings was hired by Dollar Tree as a Trainee in April of 2004. In June of 2004, he was promoted to Assistant Manager. Effective October 31, 2004, he was promoted to the Store Manager position at store no. 2939 in Willits, California. Runnings continues to be the Store Manager of store no. 2939. In December of 2005, Runnings also assisted in running Dollar Tree store no. 2262 in Healdsburg, California which had no Store Manager at that time. In his position as a Store Manager, Runnings is and has been the highest level employee at his store and the only employee to be paid on an exempt salaried basis.¹

On July 6, 2007, Runnings filed a class action complaint on behalf of current and former California Dollar Tree Store Managers alleging that they were misclassified as exempt employees and therefore improperly denied overtime pay. Specifically, Runnings alleged: 1) unfair competition and unfair business practices; 2)

¹ Runnings' District Manager, Richard Tellstrom, has an office at store no. 2939. Every Dollar Tree District Manager maintains an office in one of the stores in his or her District. This is done as a convenience to Dollar Tree and not to provide additional oversight at the store where the office is located.

1 failure to pay overtime wages, failure to pay compensation for missed meal and rest
 2 periods, and waiting time penalties, in violation of the California Labor Code and Wage
 3 Order 7; 3) failure to provide meal and rest periods; and 4) failure to provide accurate
 4 itemized wage statements.

5 Runnings has one basic theory of unlawful conduct upon which all his
 6 claims for recovery rest - that Dollar Tree improperly classified its Store Managers in
 7 California, including him, as exempt. It is that premise upon which Runnings relies to
 8 support the various allegations and forms of relief he seeks.

9 Dollar Tree denies each of Runnings' allegations and asserts that its Store
 10 Managers are properly classified as exempt. Under California law, employees are
 11 exempt from overtime compensation if they: (a) spend the majority of their time
 12 performing work that either requires the exercise of independent judgment and discretion
 13 or is directly and closely related thereto; (b) supervise two or more full-time employees or
 14 the equivalent thereof; and (c) are compensated at a rate of at least two times
 15 California's minimum wage. As a Store Manager, Runnings met all these criteria. In
 16 order properly to supervise his employees and manage his store, Runnings has and
 17 should be spending the majority of his time performing exempt work.

18 **III. UNDISPUTED FACTS**

19 1. Dollar Tree, which operates over 3,000 retail stores throughout the
 20 continental United States, owns and operates approximately 220 stores throughout
 21 California. Declaration of Paula Brady., ¶ 3 ("Brady Decl.").

22 2. Each store is run by a Store Manager who is responsible for all that
 23 happens within his or her store. Declaration of Carlos Hernandez ,¶ 3 ("Hernandez
 24 Decl.").

25 3. Runnings was hired by Dollar Tree as a Trainee in April of 2004. A
 26 true and correct copy of the Deposition of Robert Runnings ("Runnings Dep.") is
 27 attached as Exhibit A to the Declaration of Beth Hirsch Berman, 23:18-20. In June of
 28 2004, he was promoted to Assistant Manager. (Brady Decl., ¶ 5.) In November 2004,

1 Runnings became the Store Manager of store no. 2939 in Willits, California and remains
2 in that position. (Runnings Dep., 25:2-7.)

3 4. Runnings' annual base salary was approximately three times the
4 minimum wage. (Declaration of Charlotta Jacobson-Allen, ¶ 10 ("Jacobson-Allen Decl.")).

5 5. As a Store Manager, Runnings has been assisted by between three
6 to four Assistant Managers. (Runnings Dep., 60:22-61:16.)

7 6. Runnings supervises anywhere from eight to 40 hourly employees
8 including Assistant Managers. (Jacobson-Allen Decl., ¶ 9.)

9 7. The total number of hours worked by the employees in store no.
10 2939 under Runnings' direct supervision ranged from a low of 151 to a high of 1,055.
11 (Jacobson-Allen Decl., ¶ 9.)

12 8. Runnings is supervised by a District Manager, Richard Tellstrom.
13 Mr. Tellstrom oversees 12 stores. A true and correct copy of the Deposition of Richard
14 Tellstrom ("Tellstrom Dep.") is attached as Exhibit B to the Declaration of Beth Hirsch
15 Berman, 17:1-5. District Managers do not run the stores or direct the work of the store
16 employees. (Tellstrom Dep., 21:12-18.) That is left to the Store Managers. (*Id.*)

17 9. The merchandise mix and merchandise displays vary from store to
18 store because Store Managers are expected to drive sales by creating displays and
19 ordering merchandise that attracts their store's customers. (Tellstrom Dep., 65:19-66:2.)
20 As the Store Manager, Runnings was responsible for all the ordering in his store.
21 (Hernandez Decl., ¶ 10.) Orders for general merchandise were submitted on a weekly
22 basis. (Runnings Dep., 124:9-10.) In a separate order, Runnings ordered all the frozen
23 and dairy food weekly. (Runnings Dep., 30:4-14, 101:3-8.) Runnings was also
24 responsible for ordering all his store's supplies. (Runnings Dep., 132:1-19, 213:2-4.)

25 10. As a Store Manager, Runnings was responsible for a multitude of
26 management tasks such as: reviewing, analyzing and preparing reports (Runnings Dep.,
27 264:25-265:4, 371:11-16; 267:22-24); scheduling employees (Runnings Dep., 244:5-7);
28 hiring, firing and disciplining employees (Runnings Dep., 65:18-66:4; 148:21-150:25;

265:19-25); recommending and/or determining employee raises (Runnings Dep., 209:19-210:1); and promotions (Runnings Dep., 252:9-18); planning the daily work duties (Runnings Dep., 265:15-18); approving payroll; reviewing store employees' time records to make sure that all work is accurately recorded (Runnings Dep., 233:16-25); determining the number of employees needed, including deciding upon additional hiring needs for the November/December holiday season (Runnings Dep., 250:17-24); accounting for all sales transactions in the store, and regular review of cashier statistics (Runnings Dep., 123:4-21); conducting regular till audits (Runnings Dep., 167:6-9); controlling both internal and external inventory loss in the store; account for breakage, defective goods, expiration dates and field markdowns through the mark up/mark down function (Runnings Dep., 273:11-22); merchandising the store including creating attractive displays of end caps, impulse items on clip strips, gondola displays, and other forms of merchandise display (Runnings Dep., 276:22-277:1; 377:13-379:5) and creating and maintaining a workplace that is compliant with federal and state OSHA, local fire codes and, ensuring compliance with various other local, state and federal laws, regulations and ordinances. (Runnings Dep., 274:25-275:12; 267:17-21.)

Given the nature of and time it takes to carry out those managerial responsibilities, the Store Manager position that Runnings held was properly classified as exempt.

IV. ARGUMENT.

A. Summary Judgment Standard.

Summary judgment is appropriate when the pleadings, affidavits and other material present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rebel Oil Co, Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432 (9th Cir. 1995). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)

(emphasis in original). As set forth below, the undisputed facts established that as a Store Manager, Runnings' employment, from his compensation to his job responsibilities, met all of the criteria necessary to qualify him as an executive, exempt from California overtime requirements and exempt from California's rest and meal break and itemized wage statement requirements.

B. California's Executive Exemption Test.

Under California's Labor Code sections 510 (computation of overtime pay) and 515 (exemptions from payment of overtime), an employee is entitled to overtime pay for his work for an employer unless the employer demonstrates the employee's work is subject to an exemption from payment of overtime. *Conley v. Pacific Gas & Electric Co.*, 131 Cal.App.4th 260, 266 (2005). Labor Code section 515 provides that California's Industrial Welfare Commission (IWC) "may establish exemptions from the requirement [of Section 510] that an overtime rate of compensation be paid . . . for executive, administrative, and professional employees..." Cal. Lab. Code § 515(a).

The IWC established the exemptions to Section 510 by means of wage orders. The IWC's wage orders are compiled in the California Code of Regulations, Title 8. Regarding the executive employee exemption, section 1 (A) (1) of the wage order states:

A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees herein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116.7 Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

8 Cal. Code Regs. § 11070(1)(A) ("Wage Order").

The executive exemption applies where the employee's "duties and responsibilities involve the management of . . . a customarily recognized department or subdivision" of the employer; the employee "customarily and regularly directs the work of two or more other employees . . ." and the employee has "the authority to hire or fire other employees" or have "particular weight" given to his or her recommendations.

8 Cal. Code Regs. § 11070(1)(A).

C. Analysis Of The Evidence In Light Of Wage Order And The Code Of Federal Regulations.

1. Runnings' Duties And Responsibilities Involve The Management Of The Enterprise In Which He Is Employed.

Runnings is in sole charge of his store, with complete responsibility for its operations.² "In the vast majority of cases there is no difficulty in determining whether an individual is in charge of a customarily recognized department or subdivision of a department. For example, it is clear that where an enterprise comprises more than one establishment, the employee in charge of each establishment may be considered in

² "Q. Dollar Tree is the first time you've had responsibility for the entire location, correct?
A. Yes." (Runnings Dep., 75:15-17.)

charge of a subdivision of the enterprise.” 29 C.F.R. 541.104(b)(2001). As the Store Manager, Runnings was the highest ranking and only exempt employee regularly in store no. 2939. (Runnings Dep., 64:23-25.) Runnings is responsible for all aspects of the management of store no. 2939 including hiring; disciplining; evaluating employees; approving payroll; and planning and assigning work; to name a few. See III Undisputed Facts *supra*. at ¶ 10.

2. Runnings Customarily And Regularly Directs The Duties Of Two Or More Employees.

The Wage Order requires that an executive employee customarily and regularly direct the duties of two or more employees. The store that Runnings manages has been regularly staffed with three to four Assistant Managers and anywhere from 8 to 40 Associates. (Runnings Dep., 60:22-61:2; Jacobson-Allen Decl., ¶ 9). Runnings need not always be physically present when his employees work for them to be under his supervision. *Baldwin v. Trailer Inns, Inc.* 266 F.3d 1104, 1117 (9th Cir. 2001). Runnings was and is the highest ranking and only exempt employee regularly in store no. 2939. The store’s weekly work schedule is created by Runnings. (Runnings Dep., 244:5-7.) Runnings adjusts his employees’ schedules to meet the needs of the store. (Runnings Dep., 244:23-245:15.) Runnings also directs the duties of his employees on a daily basis and checks to make sure the assigned tasks are accomplished. (Runnings Dep., 39:10-40:12; 92:19-93:10; 160:9-11.)

3. Runnings Has The Authority To Hire And Fire Employees And His Recommendations Are Given Particular Weight With Regard To Promotions.

Runnings has the authority to interview, hire, evaluate, discipline, and fire employees in his store. Runnings also has made decisions and/or recommendations about promotions. (Runnings Dep., 71:16-24; 251:24-252:18.) Runnings decided when his store needed more Sales Associates. (Runnings Dep., 250:17-251:3.) Runnings has hired over 100 employees while a Store Manager. (Runnings Dep., 65:20-66:4.) In addition, Runnings has the authority to terminate employees. (Runnings Dep., 148:21-

149:25.) Based on the foregoing, Runnings clearly exercised the authority required by the third prong of the exemption test. 29 C.F.R. 541.106 (2001).

4. **Runnings Customarily And Regularly Exercises Discretion And Independent Judgment.**

The California executive exemption requires that the employee be engaged in work that is “primarily” managerial and which must require the exercise of discretion and independent judgment. *Id.* “Primarily” is defined as “more than one-half the employee’s work time.” 8 Cal. Code Regs. § 11070(2)(N). The Wage Order does not define “discretion and independent judgment.” The California Court of Appeals in *Nordquist v. McGraw-Hill Broadcasting Co.*, however, defined “discretion and independent judgment” as:

“Discretion and independent judgment” . . . involves the comparison of possible courses of conduct, and acting after considering various possibilities. It implies that the employee has the power to make an independent choice free from immediate supervision and with respect to matters of significance. The decisions must be at a level appropriate to administrative work. Matters of consequence are those of substantial significance to the policies or general operations of the business of the employer.

Nordquist v. McGraw-Hill Broadcasting Co., 32 Cal.App.4th 555, 573 (1995). In the above quoted passage, *Nordquist* adopts the definition found in 29 C.F.R. § 541.207.³ The FLSA interpretation adopted by *Nordquist* to form its definition of “discretion and independent judgment” applies equally to both the “administrative” and “executive” exemption.⁴

Runnings made numerous decisions on a daily basis utilizing discretion and independent judgment. Operating a Dollar Tree store requires that many decisions be made on a daily basis, with the decisions varying based on the particular

³ Courts may look to the federal regulations in interpreting California wage laws. See, e.g., *Alcala v. Western Ag Enters.*, 182 Cal.App.3d 546, 550 (1986) (FLSA regulations “may serve as persuasive guidance for interpreting California law”).

⁴ See also “For enforcement purposes, therefore, DLSE will . . . rely upon the language of 29 C.F.R. § 541.207 to define the term “discretion and independent judgment” in each of the exempt classifications.” DLSE 2002 Operations and Procedures Manual § 51.5.1.

1 circumstances of the store. (Hernandez Decl., ¶ 4.) Runnings has been the highest
 2 ranking executive in store no. 2939 and the employee charged with making those
 3 decisions. Although each store is overseen by a District Manager, the District Manager
 4 does not have the time nor the responsibility for making the daily decisions required to
 5 run a store. (Tellstrom Dep., 21:12-18.) Runnings alleges since July of 2007 he has
 6 worked an average of 45 to 47 hours a week. (Runnings Dep., 80:9-81:13.) In contrast,
 7 his District Manager is not in the store on a daily or even weekly basis. (Runnings Dep.,
 8 62:25-63:18.) Runnings, as Store Manager, is ultimately the person in charge of all store
 9 operations and the profitability of his store. (Tellstrom Dep., 21:12-18.)

10 Runnings is responsible for increasing store sales through his own
 11 entrepreneurial talents and management skills. Unlike many other retail chains, Dollar
 12 Tree views its Store Managers as individual entrepreneurs who know their customers
 13 and best know how to serve their needs. As a result of that philosophy, Runnings is
 14 responsible for ordering a portion of all store merchandise and he is responsible for
 15 ordering 100% of the refrigerated and frozen food. See, III Undisputed Facts at ¶ 9.

16 Runnings is also responsible for identifying sales opportunities, creating
 17 merchandise displays (Runnings Dep., 378:18-379:5); and developing and executing a
 18 plan to sell the merchandise. (Runnings Dep., 242:4-243:17). These tasks require
 19 independent judgment and discretion to determine the appropriate merchandise mix for
 20 the store and to determine how to effectively display the merchandise in the store.
 21 (Hernandez Decl., ¶ 5.) Merchandise displays vary from store to store as determined by
 22 the skill of the individual Store Managers. (Hernandez Decl., ¶ 10:3). Dollar Tree uses
 23 merchandise planners for its stores. However, the planners do not cover the entire store
 24 and are not designed to fit every store. (Hernandez Decl., ¶ 8.) Runnings' store is a
 25 racetrack style store and contains many more endcaps than other types of Dollar Tree
 26 stores. The planner contains display guidelines for only about 25% of the store's
 27 endcaps. The remaining 75% are designed by Runnings. (Runnings Dep., 106:4-8.)
 28 Runnings uses the planner as a guideline, taking into account the merchandise and

1 fixtures he has available and his own knowledge of what sells in his particular store.
 2 (Runnings Dep., 109:1-7.) Therefore, decisions about which merchandise to put on the
 3 sales floor and how to display that merchandise are left to Runnings' discretion.
 4 (Runnings Dep., 242:4-243:17; 276:22-277:1.) It is also up to him to create plans for
 5 cross-selling products, to determine what items sell well together, and how to increase
 6 sales of high margin items. (Runnings Dep., 271:3-272:22.) In addition, Runnings is
 7 responsible for planning how merchandise will be stored in the backroom. (Runnings
 8 Dep., 34:2-35:11.)

9 Runnings uses his discretion and independent judgment to make
 10 management decisions calculated to ensure store success. Runnings: (1) hires the
 11 Associates he wants (Runnings Dep., 251:21-23); (2) arranges merchandise in the store
 12 in a manner he believes to be attractive to customers (Runnings Dep., 276:22-277:1); (3)
 13 orders store merchandise (Runnings Dep., 102:3-6); (4) counsels and terminates
 14 employees (Runnings Dep., 186:18-187:15); (5) makes recommendations regarding
 15 promotion and pay raises (Runnings Dep., 209:19-210:1); (6) makes decisions about
 16 scheduling employees (Runnings Dep., 246:17-248:4); and (7) prioritizes tasks, and
 17 assigns them to employees daily. (Runnings Dep., 243:10-17; 265:15-18.) Runnings
 18 has substantially more responsibilities than any other employee in his store. When he
 19 does delegate duties to his Assistant Managers, he remains ultimately responsible for
 20 those duties.

21 **5. Runnings Spends More Than Half His Time Performing Exempt** 22 **Work.**

23 As shown by his deposition testimony, Runnings spent a substantial
 24 amount of time performing exempt work. While there has been little California case law
 25 to flesh out what is or is not "managerial work," the Wage Order specifically incorporates
 26 the definition set forth in the regulations promulgated under the FLSA.⁶ 8 Cal. Code

27 ⁵ Note that the FLSA regulations were changed in 2004. The Wage Order has not been
 28 amended to reference the new regulations, thus the pre-2004 regulations will be relied upon in this
 section.

1 Regs. § 11070 1(A)(1)(e). In particular, the Wage Order incorporates 29 C.F.R. §
2 541.102, which provides some examples of exempt work including:

3 interviewing, selecting and training employees, setting and
4 adjusting pay rates and work hours, directing work, keeping
5 production records for subordinates, evaluating employee's
6 efficiency and productivity, handling employee complaints,
7 disciplining employees, planning work, determining
8 techniques to be used, distributing work, deciding on types of
materials, supplies, machinery and tools to be used or
merchandise to be bought, stocked, and sold, controlling the
flow and distribution of merchandise and supplies, and
providing for employee safety.

9 29 C.F.R. § 541.102 (2001). Moreover, a person may be simultaneously engaged in
10 hands on, non-exempt type work and exercising managerial duties. One example would
11 be a manager physically placing items on shelves in conjunction with creating the display
12 because the placing of the merchandise is the means for carrying out the exempt task.⁷

13 California law mandates a quantitative review of an employee's duties.
14 *Ramirez v. Yosemite Water Company*, 20 Cal.4th 785, 797 (1999). The work actually
15 performed by Runnings during the course of the work week, and the amount of time he
16 spends on such work, together with Dollar Tree's expectations and the realistic
17 requirements of the job, are considered in determining whether Runnings satisfies the
18 requirement that he spend more than half his time engaged in exempt work. 8 Cal.
19 Code Regs. § 11070 1(A)(1)(e).

20 Runnings is unable to state how much time he spends performing either
21 exempt or non-exempt tasks. (Runnings Dep., 262:12-24.) He does state that he
22 believes he spends over half of his time performing non-exempt functions; however,
23 Runnings is mistaken as to what are, and are not, exempt functions. (Runnings Dep.,
24 379:18-380:5.) Runnings is under the impression that anytime he is working on the

25 ⁶ Note that the FLSA regulations were changed in 2004. The Wage Order has not been
26 amended to reference the new regulations, thus the pre-2004 regulations will be relied upon in this
section.

27 ⁷ "For example, time spent by a manager using a computer to prepare a management report
28 should be classified as exempt time where use of the computer is a means for carrying out the
exempt task." *The Statement as to the Basis of Wage Order*, IWC Statement as to the Basis
accompanying amendments to Section 1 of Wage Order 7.

1 sales floor, he is performing non-exempt work. (Runnings Dep., 377:13-380:5.) This
2 belief is not consistent with the law.

3 The Wage Order states that “[e]xempt work shall include all work that is
4 directly and closely related to exempt work and work which is properly viewed as a
5 means for carrying out exempt functions.” 8 Cal. Code Regs. §11070 1(A)(1)(e). This
6 means that activities, which viewed in the abstract seem non-exempt, will be considered
7 exempt if they are undertaken with the purpose of effectuating the exempt functions of a
8 manager's job.

9 Therefore, cashiering and stocking are not automatically non-exempt
10 functions. Rather, one must look to the purposes for which they are performed to
11 determine whether and when they are exempt or non-exempt. To the extent such work
12 is conducted to train employees or oversee their work, it is directly and closely related to
13 supervising and managing employees and is exempt. *Donovan v. Burger King*, 672 F.2d
14 221, 226 (1st Cir. 1982) (Burger King I). To the extent this work is performed as part of
15 Runnings’ designing merchandise displays, or overseeing and monitoring the work of his
16 subordinates or to assist in ordering, it would also be exempt. “[I]n other establishments
17 it is not uncommon to leave the actual distribution of materials and supplies in the hands
18 of the supervisor. In such cases it is exempt work since it is directly and closely related
19 to the managerial responsibility of maintaining the flow of materials....” 29 C.F.R. §
20 541.108(c); *See Palazzolo-Robinson v. Sharis Management Corporation*, 68 F.Supp.
21 1186, 1190 (WD Wash. 1999) (plaintiff never stopped being the manager, even when
22 she was on the floor of the restaurant pouring coffee); “[O]ne can still be ‘managing’ ...
23 even while physically doing something else.” *Donovan v. Burger King*, 672 F.2d at 226
24 (Burger King I); “[A]n employee can manage while performing other work.” *Id.* “It is
25 possible for an employee to perform managerial duties simultaneously with nonexempt
26 work.” *Cooper v. Spring Haven*, 1995 U.S. Dist. LEXIS 16918. *7 (D. Kan. 1995)
27 (plaintiff oversaw the work of other dietary employees while at the same time cooking,
28 serving meals, etc.); “[M]uch of the oversight of the operation can be carried out

1 simultaneously with the performance of non-exempt work.” *Donovan v. Burger King*, 675
 2 F.2d 516, 521 (2nd Cir. 1982) (Burger King II); *Horne v. Crown Central Petroleum, Inc.*,
 3 775 F.Supp. 189, 190 (D. SC 1991) (convenience store manager performed
 4 management duties “simultaneously” with assisting store clerks in waiting on customers);
 5 “Management function cannot readily and economically be separated from nonexempt
 6 tasks.” *Baldwin v. Trailer Inns, Inc.*, 266 F.3d at 1114; “One can still be managing if one
 7 is in charge, even while physically doing something else.” *Id.*

8 Runnings admits that while he is stocking he is directing employees,
 9 creating new displays, determining what products to cross sell, observing the holes and
 10 flow of goods to assist him in ordering and evaluating, motivating, training and directing
 11 employees. (Runnings Dep., 97:19-98:4; 128:14-129:9; 144:24-145:5; 188:12-189:25;
 12 378:14-379:5.) Contrary to Runnings’ notions of California wage and hour law, these are
 13 properly exempt tasks.

14 The evidence shows that Runnings spends the majority of his time either
 15 performing tasks that are directly exempt (direct management of staff, hiring and firing,
 16 counseling and disciplining subordinates, and the like) or are “closely related” to his
 17 management tasks thereby making them exempt too. Dollar Tree expects its Store
 18 Managers to delegate most non-exempt work so that the Store Manager is performing
 19 only the work that most other employees cannot do. Only Store Managers have the
 20 primary function of planning and assigning work. Store Managers are ultimately
 21 responsible for ordering for the store, including ordering food products for those stores
 22 which sell refrigerated food. Store Managers are responsible for reviewing store
 23 employees’ time records to make sure that all work is accurately recorded. Store
 24 Managers are responsible for determining the number of employees needed, including
 25 deciding upon additional hiring needs for the November/December holiday season.
 26 Store Managers are ultimately responsible for accounting for all sales transactions in the
 27 store, and should regularly review cashier statistics (contained on a form entitled a
 28 Cashier Comparison Report) to insure that cashiers are productive and honest. Store

1 Managers should review such reports to make sure that there is nothing unusual about
 2 the employee's average transactions and that line item voids are both within Company
 3 standards and not otherwise unusual. Store Managers should conduct regular till audits
 4 (making sure that the amount of cash in the register corresponds to the transaction
 5 accounts). Store Managers are responsible for controlling both internal and external
 6 inventory loss in the store, including taking steps to prevent theft and to record
 7 accurately goods that cannot be sold or are being sold as part of a \$1.00 grab bag
 8 (referred to as a mark up/mark down function). As part of the mark up/mark down
 9 function, Store Managers must account for breakage, defective goods, expiration dates
 10 and field markdowns (often merchandise placed in a grab bag) through the mark
 11 up/mark down function. Store Managers are responsible for store presentation; the store
 12 should be clean and recovered, with attractive displays of end caps, impulse items on
 13 clip strips, gondola displays, and other forms of merchandise display. Store Managers
 14 are responsible for completing performance evaluations on their employees. In order to
 15 accomplish all the tasks outlined above, Runnings will spend more than half of his time
 16 performing exempt work. (Hernandez Decl., ¶ 6.)

17 Furthermore, the determination of whether an employee is exempt or non-
 18 exempt also depends on the employee's performance of his work duties. *Id.* As the
 19 court in *Ramirez* noted:

20 An employee who is supposed to be engaged in [exempt]
 21 activities during most of his working hours and falls below the
 22 50 percent mark due to his own substandard performance
 should not thereby be able to evade a valid exemption.

23 *Ramirez v. Yosemite Water Co.*, 20 Cal.4th at 802.

24 Accordingly, the California Supreme Court advises:

25 [T]he trial court should also consider whether the employee's
 26 practice diverges from the employer's realistic expectations,
 27 whether there was any concrete expression of employer
 28 displeasure over an employee's substandard performance,
 and whether these expressions were themselves realistic
 given the actual overall requirements of the job.

1 *Id.*

2 Dollar Tree made it clear to Runnings that he was expected to spend
3 greater than half of his time performing exempt functions. (Runnings Dep., 48:15-22.)
4 Dollar Tree requires its Store Managers to complete weekly payroll certifications
5 certifying that they spend greater than fifty percent of their time performing various
6 exempt functions. (Runnings Dep., 48:15-22.) Runnings completed the certifications
7 sometimes certifying "yes" and other times "no".⁸ Runnings claims that when he was not
8 able to certify that he spent over half his time performing exempt tasks, he was unable to
9 do so because his payroll hours were too low. Matching his stores' payroll hours to his
10 certification responses, however, shows no correlation between the certifications and
11 hours. For example, on January 20, 2007, Runnings certified "no" when he had utilized
12 318 payroll hours⁹ while he certified "yes" on June 25, 2005 when he used only 299
13 payroll hours and had 13% greater sales. (Jacobson-Allen Decl., ¶ 7); Runnings Dep.,
14 Exhibit 42. When asked what was different in the weeks for which he was able to certify
15 "yes" from the weeks he responded "no", Runnings was unable to provide an
16 explanation. (Runnings Dep. 315:16-317:3.) Moreover, on repeated occasions
17 Tellstrom told Runnings that his store would benefit from Runnings spending more time
18 in the office analyzing the workflow, developing a store plan and delegating the work on
19 the floor. (Runnings Dep., 372:4-10.) Despite Dollar Tree's expectations and explicit
20 instructions, Runnings continued to perform work out on the sales floor. (Runnings Dep.,
21 374:18-22.)

22
23
24 ⁸ Runnings' belief as to what activities are exempt is incorrect. In completing his certifications,
25 Runnings counted all time that he spent designing a display as non-exempt if any portion of that
26 time involved placing merchandise on the display. (Runnings Dep., 379:18-380:5.) Thus, the
27 fact that Runnings checked "no" on his certification is not dispositive as to whether Runnings
28 spent more or less than fifty percent of his time performing exempt functions during that week.
Moreover, Runnings acknowledges he has no evidence to show how he actually spent his time.
(Runnings Dep., 262:12-21.) The certifications do show that Runnings knew what duties were
expected of him.

⁹ Payroll hours include time worked in the store by non-exempt employees so Runnings' hours
are not included in the payroll hours figures.

1 It is Dollar Tree's reasonable expectation that its Store Managers spend
 2 more than half their time performing exempt management duties. The Store Manager is
 3 in charge of a multimillion dollar enterprise with numerous employees and constant flow
 4 of merchandise. In order to effectively run a store, the Store Manager has to efficiently
 5 utilize properly trained associates based upon an analysis of the store's workflow in
 6 addition to the other managerial tasks associated with running a safe and profitable
 7 store. (Hernandez Decl., ¶ 6.) Dollar Tree expects the Store Manager to delegate so
 8 that the Store Manager is performing only the work that most other employees cannot
 9 do. (Hernandez Decl., ¶ 7.) In order to properly carry out all the tasks and duties
 10 required of a Store Manager outlined above, the Store Manager will necessarily spend
 11 the majority of his time on non-exempt tasks. Indeed, the majority of Dollar Tree store
 12 managers spend more than half their time performing exempt functions. (Jacobson-
 13 Allen Decl., ¶ 8.)

14 Runnings cannot make himself a non-exempt employee by failing to
 15 complete required Store Manager functions. Runnings admits that he failed to:
 16 (1) complete employee evaluations (Runnings Dep., 94:16-95:9; 97:3-12); (2) complete
 17 mark up and mark downs in a timely fashion (Runnings Dep., 363:22-364:2); (3) move
 18 time sensitive seasonal merchandise onto the sales floor (Runnings Dep., 365:1-10); (4)
 19 make mandatory deposits in accordance with asset protection standards (Runnings
 20 Dep., 369:12-18); and (5) consistently perform register audits. (Runnings Dep., 369:24-
 21 370:3.) Each of these tasks is an exempt function that Runnings has failed to complete
 22 in clear violation of Dollar Tree policy.

23 Runnings claims he must be on the floor to complete tasks that he states
 24 his hourly employees cannot complete in the budgeted time. (Runnings Dep., 317:19-
 25 319:1; 371:22-373:3.) Other than his blanket assertion that he lacked sufficient payroll
 26 hours, Runnings has no evidence to support that claim. In fact, Runnings admitted that
 27 he could not explain what was different in the weeks where he certified "yes" from the
 28 weeks he certified "no". (Runnings Dep., 315:16-317:3.) The training of employees is an

-18-

1 exempt task that Runnings states he often delegates. (Runnings Dep., 253:7-254:19.)
 2 To the extent he is delegating exempt training to subordinates and opting to perform
 3 non-exempt work, Runnings is failing to perform his job in an acceptable manner.
 4 Moreover, Runnings demonstrated at his deposition that he was not familiar with much
 5 of the information made available to him to assist him in performing exempt functions.
 6 (Runnings Dep., 96:12-97:9; 100:13-18; 117:16-118:6; 118:10-14; 118:21-119:2; 136:13-
 7 16; 137:7-24.)

8 If a Store Manager is properly fulfilling all of his required duties, he will
 9 have spent over half his time performing exempt functions. Based on all his
 10 responsibilities and his testimony as to how he spends his time, it is clear Runnings does
 11 spend over half his time performing exempt functions. The fact that Runnings believes
 12 he does not spend more than half his time performing exempt functions, because he
 13 misconstrues what is and is not exempt under the law, does not make him non-exempt.
 14 If Runnings did not always spend half his time performing exempt functions, it is only
 15 because of his substandard performance and that too will not make him non-exempt.

16 **6. Runnings' Monthly Salary Is Two Times The California**
 17 **Minimum Wage.**

18 The Wage Order requires that an executive employee "earn a monthly
 19 salary equivalent to no less than two times the state minimum wage for full-time
 20 employment." 8 Cal. Code Regs. § 11040(1)(A). California's minimum wage was just
 21 raised to \$8.00 per hour. Runnings' annual base salary increased from a low of \$45,500
 22 in 2004 to \$49,200 in 2007 – approximately three times the current minimum wage. In
 23 addition to his base salary, Runnings is eligible for and has received monthly bonuses
 24 for meeting sales goals. (Runnings Dep., 99:10-15.)

25 **D. Runnings Cannot Assert Any Claims Arising Prior To December 11,**
 26 **2004.**

27 Assuming arguendo the court does not grant summary judgment, Runnings
 28 cannot recover upon any of his claims arising prior to December 11, 2004. Pursuant to
 the Order and Judgment Granting Final Approval of Settlement, attached as Exhibit A to

the Request for Judicial Notice ("RJN"), Runnings, as a putative class member, is prevented from asserting claims relating to overtime and meal and rest break violations arising before December 11, 2004.

E. Runnings Position Is Properly Classified As Exempt, Thus The Remaining Counts Must Be Denied.

1. Exempt Employees Are Not Entitled To Meal Periods Or Rest Periods.

California law leaves exempt employees without overtime compensation and all "other benefits, such as meal and rest breaks." *Whiteway v. FedEx Kinko's Office and Print Servs., Inc.*, No. C 05-2320 SBA, 2007 WL 2408872, at *3 (N.D. Cal., Aug. 21, 2007); see also Wage Order 7-2001 § 1(A) ("Provisions of Section 3 through 12 [including meal breaks and rest breaks] shall not apply to persons employed in administrative, executive, or professional capacities."). It follows that under California law Runnings' claims for meal and rest break violations are without merit because Runnings is an exempt employee. Thus, this claim must be denied.

2. Unfair Competition And Unfair Business Practices Claims Fail When The Underlying, Claimed Labor Law Violations Fail.

Runnings bases his unfair competition and unfair business practices claims on his underlying claims for overtime, meal and rest breaks, and itemized wage statements. However, Runnings' status as an exempt employee moots each of his underlying claims of state law violations. Because unfair competition and unfair business practice claims "borrow[] violations of other laws [including the Labor Code] when committed pursuant to business activity," *Harris v. Investor's Business Daily, Inc.*, 138 Cal.App.4th 28, 32-33 (2006), it follows that Runnings' unfair competition and unfair business practices claims fail due to the failure of Runnings' underlying claims. Stated differently, because Runnings, as an exempt employee, is not entitled to overtime compensation, meal breaks, rest breaks or itemized wage statements, none of his claims remain to sustain an unfair competition and unfair business practices claim. Accordingly, this claim must be denied.

3. Exempt Employees Are Not Entitled To Itemized Wage Statements

The California Labor Code requires employers to furnish itemized wage statements to all their employees “except for any employee . . . who is exempt . . . under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission” Cal. Labor Code § 226(a). California law thus moots Runnings’ claim for damages or penalties on itemized wage statement grounds because he is an exempt employee. This claim, therefore, must be denied.

4. Runnings Has No Claim For Waiting Time Penalties.

The waiting time penalties sought by Runnings could be due only in the event Runnings were owed wages at the time his employment terminates. Cal. Labor Code §§ 201 and 203. While Dollar Tree disputes that Runnings is owed any overtime or rest or meal period compensation, because he is an exempt employee, even if he were owed such wages, Runnings is still employed by Dollar Tree. Thus, he has no standing to assert a claim for waiting time penalties.

V. CONCLUSION

Runnings is an exempt executive employee under California law as he spends a majority of his time performing exempt functions. Runnings cannot reclassify his position by failing to carry out his job duties in accordance with Dollar Tree's policies and reasonable expectations even if such failure causes him to spend more than fifty percent of his time on non-exempt tasks. Therefore, Dollar Tree respectfully submits it is entitled to summary judgment on all counts.

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1 Assuming *arguendo* the court does not grant summary judgment, Runnings
2 cannot recover upon any of his claims arising prior to December 11, 2004. Pursuant to
3 the Order and Judgment Granting Final Approval of Settlement, attached as Exhibit A to
4 the RJN, Runnings, as a putative class member, is prevented from asserting claims
5 relating to overtime and meal and rest break violations arising before December 11,
6 2004.

7 DATED: January 19, 2008

Respectfully submitted,

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9 By: /s/
10 ALEX HERNAEZ

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12 DOLLAR TREE STORES, INC.
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